Supreme Court, U.S.
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No. 94-1303

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROBERT ANDERSON HOOVER,
Petitioner,
v.
DAVID R. HINSON, Administrator,
Federal Aviation Administration, and
NATIONAL TRANSPORTATION SAFETY BOARD,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Whether setting aside the trial judge's credibility findings violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

II. Whether revocation of Petitioner's medical certificate when Petitioner met the standards prescribed by the Federal Aviation Regulations violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

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DAVID R. HINSON, Administrator,
Federal Aviation Administration, and
NATIONAL TRANSPORTATION SAFETY BOARD,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Robert Anderson Hoover, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the District of Columbia entered on November 3, 1994.

OPINIONS BELOW

The Federal Aviation Administration revoked Petitioner's airman medical certificate on an emergency basis on December 14, 1993, alleging that he did not meet the medical standards of 14 C.F.R. § 67.15(d)(2)(ii) and (f)(2) and 14 C.F.R. § 67.17(d)(2)(ii) and (f)(2). (Appendix E) Petitioner appealed the Administrator's Emergency Order, and an administrative hearing regarding said revocation was held, resulting in Judge William

R. Mullins' decision and order in favor of Petitioner, which issued on January 16, 1994. (Appendix C) The FAA appealed Judge Mullins' order to the National Transportation Safety Board, resulting in its Order in favor of the FAA, served February 18, 1994. *Hinson v. Hoover*, NTSB Order No. EA-4094, February 18, 1994. (Appendix B). Hoover petitioned the United States Court of Appeals to review the Order of the NTSB, which petition was denied by judgment of the Court of Appeals on November 3, 1994. (Appendix A)

JURISDICTION

The decision of the court below was entered on November 3, 1994. (Appendix A) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The petition is filed within 90 days of the judgment of the United States Court of Appeals for the District of Columbia. Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment

> "No person shall be . . . deprived of life, liberty or property, without due process of law, . . ." U.S. Const. Amend. V.

STATEMENT OF THE CASE

Petitioner is a well known, 73 year old aviator, and acknowledged Dean of air show pilots. General Chuck Yeager has described Hoover as "the best pilot I ever knew." Petitioner learned to fly at age 16 and subsequently became a fighter pilot. In World War II, he flew 59 combat missions, during the last of which he was shot down and spent most of the remainder of the war as a prisoner in Stalag 1 prison camp. Petitioner subsequently worked as a test pilot both for the military and private industry, and later began flying experimental and newly designed aircraft. Petitioner tested and/or flew countless

aircraft and was on the XS-1 rocket research program with Chuck Yeager.

During the course of his aviation career, Petitioner developed various flight demonstration routines. One of those routines, involving the Aero Commander Shrike, became his trademark. Throughout his illustrious career, Petitioner has experienced and successfully coped with countless emergencies and mechanical failures, both of his own and those of others; he has accumulated an estimated 20,000 hours of flight time.

On June 19-21, 1992, Petitioner participated in the Air and Space Air Show in Oklahoma City, Oklahoma. He performed his usual and customary aerobatics routine each day. On August 26, 1992, more than two months after the performance, Clint Boehler and James Kelln, two FAA inspectors, closeted themselves in a room in the Oklahoma City FAA Flight Standards District Office and planned a way to have Petitioner grounded. A third FAA inspector, Norbitt Nester, overheard Boehler and Kelln's conversation, and testified that Boehler and Kelln had collaborated, conspired to file two separate reports, and intended to make it appear as if they had not collaborated. The FAA failed to call either inspector to rebut this testimony. The collusive reports alleged that Petitioner's flying had deteriorated and that he appeared medically unfit. They further alleged that Petitioner was shunned by his colleagues. These statements were filed, and the next day, August 27, 1992, the FAA, acting on the inspectors' strikingly similar and unsubstantiated allegations of substandard performance at an air show more than two months earlier, demanded that Petitioner undergo psychiatric evaluations by doctors of the FAA's choosing.

Petitioner, having had no reason to question his medical fitness or flying abilities, complied. Dr. Garrett O'Connor, who had been selected by the FAA to conduct the testing, concluded that Petitioner was "fit to hold a second-class medical certificate from a neuropsychological and

neuropsychiatric point of view and should therefore be permitted to continue his flight activities."

Although such conclusion should have ended the FAA's inquiry, it did not. On April 14, 1993, Petitioner and Dr. Bert Puskas (Petitioner's personal Aviation Medical Examiner) participated in a conference call with Dr. Barton Pakull, Dr. William Hark and Dr. Jon Jordan of the FAA. Despite the recommendation from Dr. O'Connor, Dr. Pakull stated he did not believe Petitioner was fit to fly. He further stated that the doctors who performed the tests and reported their conclusions were just "tools," and that it is he who makes the decisions in Washington. Consequently, Dr. Pakull, on April 13, 1994, informed Petitioner that he was grounded.

Petitioner protested on the basis that he had complied with the FAA's request for testing, at his own expense, and had received a clean bill of health. From the time he was first contacted by the FAA in August, 1992 up until the time of the April 14, 1993 conversation with Dr. Pakull, Petitioner had performed aerobatic routines 33 times without incident. As a result of his pleading, the FAA agreed to a new, independent examination if Petitioner surendered his medical certificate to his flight surgeon, Dr. Puskas. Although under no obligation to do so, Petitioner complied with this request.

The FAA then sent Petitioner to the UCLA Neuropsychiatric Institute for further testing which resulted in a recommendation from the UCLA panel that his airman certificate be reinstated. Acting in complete disregard of this second recommendation, the FAA refused to institute Petitioner's certificate and forwarded the test results to a psychologist—Dr. Richard Gaines—associated with the FAA, who disagreed with the Institute.

Petitioner subsequently brought his problem with the FAA to the attention of Dr. Brent Hisey, a neurosurgeon and a flight surgeon at Tinker Air Force Base in Oklahoma. Dr. Hisey agreed to review Petitioner's case on the

condition that he submit to another complete examination, and that Dr. Hisey render his opinion candidly whether favorable to Petitioner or not. Petitioner then underwent a third series of exams with Dr. Hisey and clinical psychologist David Johnsen. The conclusion reached from this third set of tests was that Petitioner was qualified for his medical certificate, and the test results were forwarded to the FAA.

Despite the fact that three independent sets of tests concluded Petitioner should retain his medical certificate, Dr. Pakull would not change his position. Petitioner then demanded return of his certificate, and the FAA responded on December 14, 1993 with an Emergency Order of Revocation, alleging that Petitioner did not meet the medical standards of the Federal Aviation Regulations. The Emergency Order of Revocation was filed as the Complaint in the proceedings below. (Appendix D)

The Administrative Law Judge found that the Administrator had not shown by a preponderance of the evidence that Petitioner suffered the cognitive deficit as alleged in the Order, and overruled the Administrator's Emergency Order of Revocation. The NTSB reviewed the matter and concluded that all of the law judge's findings were belied by the evidence, and his analysis was clearly deficient. Accordingly, the NTSB reversed the decision of the Administrative Law Judge and affirmed the Administrator's emergency order of revocation. Petitioner filed a timely Petition for Review, invoking the jurisdiction of the United States Court of Appeals under 49 U.S.C. § 1486(a). On November 3, 1994, the Court of Appeals rendered judgment that the petition for review be denied for substantially the same reasons as set out in the Board's order.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, RENDERED ON NOVEMBER 3, 1994, CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER UNITED STATES COURTS OF APPEALS, AS WELL AS SANCTIONED THE DEPARTURE FROM DUE PROCESS REQUIREMENTS COMMITTED BY THE NTSB.

A. Setting Aside The Trial Judge's Credibility Findings Violates The Due Process Clause Of The Fifth Amendment To The United States Constitution.

This is a case which illustrates, painfully, how necessary the oversight of administrative agencies of the United States by the federal judiciary really is; it presents this Court with an opportunity to inter one of the most wrong-headed and due process-threatening rules ever fashioned: the so-called rule of the *Doe*[1] case. In that case the NTSB ruled that:

> On the issue of credibility of the expert medical witnesses, we find that they are all credible to the extent that the term "credibility" refers to the truthfulness of the witness. The Board's traditional approach to medical expert testimony has not been to evaluate it for the truth or falsity of the statements made because the matter of *the veracity of the witness has already been resolved when the witness is evaluated and accepted as an expert in the field* of medicine about which he has been called to testify (*Emphasis supplied*). Once expertise or qualification to give an opinion on the particular medical condition at issue has been established, the Board evaluates the testimony on the basis of logic, depth, and persuasiveness. *Doe* at 90.

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[1] *Administrator v. Doe*, 4 NTSB 84 (1983), *aff'd*, 732 F.2d 163 (9th Cir. 1984).

By creating the monster that is *Doe*, the NTSB has either evinced a startling naiveté concerning the ready supply of medical witnesses whose opinions are for sale to litigants, or has constructed a thinly-veiled vehicle to arrogate to itself powers which due process has traditionally required to be vested in the trier of fact. To suggest that every doctor who can survive *voir dire* on the issue of his or her qualifications is *ergo* a teller of truth is, in every sense of the word, fatuous.

An overview of the genesis of the case illustrates the desperate need for judicial oversight of the FAA and NTSB. More than *sixty days* after an active air show performer exhibits alleged symptoms of infirmity, two FAA inspectors to whom the safety of the public has been *in part* [2] entrusted finally get around to making a report, trying to be careful to conceal its collusive nature. Petitioner continued to perform his aerial "act" in this and other countries on some 33 occasions. He submitted to not one but two FAA-designed medical examinations; both teams cleared him to fly. Both teams were overruled by Dr. Pakull, who was present at the trial but declined to take the witness stand to explain his conduct. The FAA had two other experts at the trial—Neurologist John Hastings and Psychologist (and COGSCREEN architect) Gary Kay, who failed to testify. The *only* medical witness upon whose testimony a revocation could be predicated—Dr. Robert Elliott—was soundly trounced in the credibility department, as follows:

1. Dr. Elliott lied to Petitioner when he said that the tests he would perform would in no way affect Petitioner's right to fly.

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[2] It must be noted that their views of the adequacy of Hoover's maneuvering skills were beyond the pale of these conspirators' expertise, since this judgmental function had been given over to the ACE (Aerobatics Competency Evaluator) program; they could only damage Petitioner directly by creating a *medical* issue, which they did.

2. Despite his claim at trial that he found Petitioner to be unfit for a medical certificate, Dr. Elliott *never* offered that opinion to anyone else *until* he was solicited to "toughen up" his stance (by telephone) by Dr. Pakull with the help of FAA regular Dr. Richard Gaines.

3. Dr. Elliott lied when he asserted, repeatedly, that the computer version of a test he administered to Petitioner was a valid clinical version, and capitulated only when confronted by a statement from the manufacturer that the *only* shipments made of the computerized version were plainly labelled "For Research Purposes Only."

4. Dr. Elliott admitted to trial judge Mullins that he had never tested Petitioner for the purpose of determining his fitness to fly.

Consequently, the administrative law judge found that Dr. Elliott's report had been discredited. Despite such evidence, The NTSB held ". . . we think all of the law judge's findings are belied by the evidence, and his analysis is clearly deficient." The NTSB then concluded that the Administrator proved by a preponderance of the evidence that Petitioner has a cognitive deficit which makes him unqualified to hold an unrestricted second class airman medical certificate. Indeed, the decision of the NTSB sounds more in advocacy than in judicial neutrality, and suggests that the exercise in Oklahoma City was a waste of the public's and Petitioner's time and considerable expense. The U.S. Court of Appeals affirmed the NTSB decision within three days of oral argument.

Petitioner is entitled to the protection of the Due Process Clause of the Fifth Amendment to the United States Constitution in connection with these proceedings. The administrative hearing, as impacted by the subsequent reversal of the ALJ's decision by the NTSB and denial of petition for review by the Court of Appeals, must have been conducted with "fundamental fairness." If not, Petitioner has been denied procedural due process. *Watson*

v. Patterson, 358 F.2d 297, 298 (10th Cir.), *cert. denied*, 385 U.S. 876 (1966).

Due process mandates that the fact-finder, in this case the ALJ, receive and consider all competent and material evidence before making a final decision. *Beck v. Quicktrip Corp.*, 708 F.2d 532, 536 (10th Cir. 1983) (quoting *Frank Adam Electric Co. v. Westinghouse Electric & Mfg. Co.*, 146 F.2d 165, 168 (8th Cir. 1945)). Part and parcel of that consideration of all the evidence is an evaluation of the credibility of the witnesses. *Beck* at 536. Included in this evaluation is an assessment of the believability of expert witnesses. It is fundamental that "the credibility of opinion evidence is for the fact-finder." *Huddell v. Levin*, 537 F.2d 726, 736 (3rd Cir. 1976) (citing *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944)); *see also, Dawson v. Chrysler Corp.*, 630 F.2d 950, 960 (3rd Cir. 1980), *cert. denied*, 450 U.S. 959 (1981).

The ALJ in the case at bar performed his function according to the dictates of due process; upon hearing and considering all the evidence, the ALJ determined, among other conclusions, that the FAA's experts were not credible. The NTSB, ostensibly relying on its decision in *Doe*, reversed the ALJ by undermining the factfinder's very function—the assessment of the credibility of the evidence. This action by the NTSB deprived Petitioner of due process. The adoption of the NTSB Order by the Court of Appeals is a sanctioning of the NTSB's departure from constitutional guarantees of due process.

It is a well established Board precedent that resolution of a credibility determination is within the exclusive province of the law judge unless made in an arbitrary or capricious manner. *Chirino v. NTSB*, 849 F.2d 1525, 1529 (D.C. Cir. 1988). As the FAA itself admits, the "Board's policy is not to disturb a credibility finding 'unless there is a compelling reason or the finding was clearly erroneous.'" *McGraw v. NTSB*, 3 N.T.S.B. 2345 (1980).

Credibility findings are within the exclusive province of the law judge, who alone, is in a position to observe the demeanor of the witnesses, and the "Board is most reluctant to disturb a credibility finding by a [law judge] unless the record reflects a compelling reason for such action." *Coleman v. NTSB*, 1 NTSB 229 (1968); *Miranda v. NTSB*, 866 F.2d 805 (5th Cir. 1989). Stripped to its essentials, this is merely a challenge to the ALJ's credibility assessments, a challenge for which the Board is given a very narrow window of appellate scrutiny: ". . . whether made by jury, judge or agency a determination of credibility is nonreviewable unless there is uncontrovertible documentary evidence or physical fact which contradicts it. As the trier of fact, the law judge is in the best position to make these determinations." *Administrator v. Smith*, 5 NTSB 1560, 1563 (1986).

In the present case, the trier of fact found that Elliott unethically administered an experimental test to Petitioner. Moreover, the experimental version is useless as an assessment tool. Thus, either the FAA expert had been improperly administering a useless diagnostic tool over his years of practice and making diagnoses from it, or, he had purposefully disregarded the fact that the computer version is a mere research vehicle. Judge Mullins also found that Petitioner was not prepared for the time involved with Dr. Elliott's testing and did not have sufficient breaks. Dr. Antoinette Appel testified that such conditions cause poor performance. Thus, in this instance, Judge Mullins was not questioning Dr. Elliott's opinion, but the reliability of the data from which he formed his opinion. This is the exact analysis of logic, depth, and persuasion that a *fact finder* is charged with employing, and which the NTSB wrongfully covets. As the Court of Appeals wrongfully sanctioned the NTSB's departure from the accepted and usual course of judicial proceedings as required by the decisions of this Court and other federal circuit courts, the Petitioner requests that this Court exercise its power of supervision.

B. Revocation Of Petitioner's Medical Certificate When Petitioner Meets The Standards Prescribed By The Federal Aviation Regulations Violates The Due Process Clause Of The Fifth Amendment To The United States Constitution.

The three batteries of testing that Petitioner underwent concluded that he was fit to hold his second class airman certificate. Dr. Garrett O'Connor, who was selected by the FAA and conducted the first battery of tests concluded, "It is my opinion that Mr. Hoover is currently fit to hold a second class medical certificate from a neuropsychological and neuropsychiatric point of view and should therefore be permitted to continue his flight activities." The results from the UCLA Neuropsychiatric Institute and Hospital (also selected by the FAA), where the second battery was conducted, were: "Therefore, on this basis, we favor a recommendation that reinstates his license on a temporary 3-6 month period during which his current medical and neuropsychological status is closely monitored for potential change. Although such change is unlikely, we are confident that Hoover would appreciate the importance and significance of this recommendation for all parties concerned." The results of the third battery, as described by Dr. David E. Johnsen, were: "Mr. Hoover is not suffering from any unusual or significant cognitive dysfunction that would interfere with his ability to function as pilot in command of any aircraft for which he had been appropriately rated by the FAA. Likewise, there are no neuropsychological indications that would contraindicate his maintaining his Second Class Medical Certificate."

14 C.F.R. § 67.11 establishes that an applicant who meets the medical standards prescribed in this part, based on medical examination and evaluation of history and condition is *entitled* to an appropriate medical certificate. *Beins v. United States*, 695 F.2d 591 603 (D.C. Cir. 1982) ("Like the court in *Duncan*, we find the language of entitlement to be significant: If the applicant meets

the medical standards, he must be given a certificate—at that point in the certification process the FAA's decision is not discretionary"); *Duncan v. United States,* 355 F. Supp. 1167, 1169 (D.D.C. 1973). It seems clear, therefore, that any applicant meeting the standards as set forth by the Administrator has a legal right to the certificate. *Harr v. United States,* 705 F.2d 500, 503 (D.C. Cir. 1983). Petitioner, with a 50 year aviation career, demonstrated his medical fitness to the standards required by the Federal Aviation Regulations year after year, and then an additional three times, yet had his medical certificate revoked by an FAA employee who had never met him.

Under the Fifth Amendment to the United States Constitution, the federal government shall not take a person's life, liberty or property without due process of law. In the present case, the FAA and the NTSB have taken Petitioner's in defiance of that precept. Without his second class airman medical certificate, Petitioner is not able to perform and pursue his vocation as an air show performer. This Court has held that:

> [t]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment. . .

Greene v. McElroy, 360 U.S. 474, 492, 79 S. Ct. 1400, 1411, 3 L.Ed.2d 1377, 1388 (1959)); *see also DiMartini v. Ferrin,* 906 F.2d 465, 466 n.3 (9th Cir. 1990).

14 C.F.R. § 67.11 establishes that an applicant who meets the medical standards prescribed in this part, based on medical examination and evaluation of history and condition is entitled to an appropriate medical certificate. *Beins* at 603. Three sets of tests indicated that Petitioner was qualified, yet the FAA revoked his medical certificate. To do so, acting on unsubstantiated reports resulting from collusive efforts and despite the three sets of contrary results, was intentional, arbitrary and capricious.

The NTSB rubber-stamped the FAA's revocation, relied on evidence of unethical and diagnostically worthless testing, and intentionally ignored the trial court's credibility findings which destroyed the FAA's *only* critical witness. The NTSB has turned a deaf ear to Petitioner, and has listened only to the sirens of the FAA. The Court of Appeals has rubber stamped the decision of the NTSB. Both agencies have vigorously eschewed their most important obligation: to guarantee those whom they regulate at least the semblance of a level playing field. The notion of fair play protected by procedural safeguards that is demanded by the Fifth Amendment to the Constitution precludes an administrative agency from promulgating a regulation affecting individual liberty or a property interest, which the rulemaker may then with impunity ignore or disregard as it sees fit. *Montilla v. Immigration and Naturalization Service*, 926 F.2d 162, 164 (2d Cir. 1991). The affirmance by the Court of Appeals of the NTSB's disregard for the Federal Aviation Regulations directly conflicts with the decision of another United States court of appeals on the same matter. In addition, it is a great departure from the accepted and usual course of due process proceedings, so as to call for an exercise of this Court's power of supervision.

In short, in a case where the party with the burden of proof came to court with corrupt evidence to deprive an American Icon of his right to professionally exist, the "government" huddles with itself, and declares victory. In so doing, the FAA and the NTSB have forfeited—in the greater quadrant of the aviation community—what questionable credibility they may have earlier had. If this injustice cannot be set right by this Court, all of those who fly are simple targets for those bad intentioned officials who arbitrarily and capriciously set out to curtail pilots' careers.

CONCLUSION

Based on the foregoing arguments and authorities, this Court is respectfully urged to grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Nov. 3, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1318

ROBERT A. HOOVER,
Petitioner

v.

NATIONAL TRANSPORTATION SAFETY BOARD and
DAVID R. HINSON, Administrator,
Federal Aviation Administration

On Review from the National Transportation Safety Board

Before: WILLIAMS, GINSBURG, and ROGERS, *Circuit Judges.*

JUDGMENT

This petition for review was considered on the record from the National Transportation Safety Board and on the briefs and arguments of counsel. The court is satisfied that appropriate disposition of the case does not call for further opinion. *See* D.C. Cir. Rule 36(b).

There is substantial evidence in the administrative record to support the National Transportation Safety Board's conclusion that the Administrator proved by a preponderance of the evidence that the petitioner's license was properly revoked under 49 U.S.C. § 44709(b)(1)(2) and 14 C.F.R. § 67.15. Therefore, it is

ORDERED and ADJUDGED that the petition for review be DENIED substantially for the reasons set out in the Board's Order and Opinion No. EA-4094 of February 18, 1994.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(2). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
FOR THE COURT

/s/ Ron H. Garvin
RON H. GARVIN
Clerk

APPENDIX B

Served: February 18, 1994

NTSB Order No. EA-4094

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the
NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of February, 1994

Docket SE-13417

DAVID R. HINSON, Administrator,
Federal Aviation Administration,
Complainant,

v.

ROBERT ANDERSON HOOVER,
Respondent.

OPINION AND ORDER

The Administrator has appealed from the oral initial decision issued by Administrative Law Judge William R. Mullins, at the conclusion of an evidentiary hearing held January 13 through January 16, 1994.[1] In that decision, the law judge reversed the Administrator's emer-

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

gency order revoking respondent's airman medical certificate. The Administrator's emergency order alleges that respondent does not meet the medical standards of paragraphs (d)(2)(ii) and (f)(2) of sections 67.15 and 67.17 of the Federal Aviation Regulations (FAR), 14 CFR Part 67,[2] because he has a cognitive deficit.[3]

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[2] FAR §§ 67.15 and 67.17(d)(2)(ii) and (f)(2) provide that to be eligible for a second-class or third-class medical certificate, respectively, an applicant must meet the following requirements:

(d) *Mental and neurologic.* . . .

(2) *Neurologic.* . . .

(ii) No other convulsive order, disturbance of consciousness, or neurologic condition that the Federal Air Surgeon finds—

(a) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(b) May reasonably be expected, within two years after the finding, to make him unable to perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

(f) *General medical condition.* . . .

(2) No other organic, functional, or structural disease, defect, or limitation that the Federal Air Surgeon finds—

(i) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(ii) May reasonably be expected, within two years after the finding to make him unable to perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

[3] A cognitive deficit is a disturbance of the brain which interferes with thinking. (Testimony of Dr. Pincus, TR-472). *Stedman's Medical Dictionary*, 25th Edition at 325 (1990) defines "cognition" as a "generic term embracing the quality of knowing, which includes perceiving, recognizing, conceiving, judging, sensing, reasoning, and imagining."

The Administrator asserts on appeal that the law judge erred by reversing the emergency order. The Administrator argues that a preponderance of the evidence, some of which, he claims, was erroneously excluded by the law judge, supports the Federal Air Surgeon's determination that respondent is unqualified to hold an unrestricted medical certificate.[4] For the reasons that follow, we agree. We reverse the initial decision.

Respondent is a renowned air show performer. His illustrious aviation career spans over 50 years. During World War II he was a Navy pilot. While flying his last combat mission his aircraft was shot down, and he was taken as a prisoner of war.[5] After leaving the military, he worked as a test pilot for both the military and private industry, where he developed various flight demonstration routines. Since leaving private industry he has performed aerobatic routines at air shows all over the world. After 25 years of performing, respondent, at the age of 72, is known as the "Dean" of air show pilots. (Reply brief at 2).

In June 1992, respondent performed at an air show in Oklahoma City, Oklahoma. Two FAA Aviation Safety Inspectors witnessed the performance. Both subsequently submitted statements which questioned respondent's physical and mental condition, based on their observations during his performance and while on the ground. Respondent was subsequently asked by the Federal Air Surgeon's office to submit to neurological, psychological, and psychiatric evaluations. Respondent submitted to the requested evaluations and was re-tested at his request, when the first results were deemed unfavorable by the office of the Federal Air Surgeon. The Administrator's emergency

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[4] Respondent has filed a brief in replying urging the Board to affirm the initial decision.

[5] This fact is relevant in that respondent's experts claim he sustained a head trauma that could explain the abnormal findings of two radiological examinations, *infra*.

order was issued as a result of the Federal Air Surgeon's final determination that all of the evaluations establish that respondent has a cognitive deficit.

Garrett O'Connor, M.D., a psychiatrist, carried out a clinical evaluation of respondent to determine the possible presence of neuropsychological factors which might disqualify respondent from holding a medical certificate. (Administrator's Exhibit A-1, Respondent's airman medical file, at 174-181). Dr. O'Connor performed a standard psychiatric interview. He found a few abnormalities on the mental status examination relating to short-term memory deficits and an impairment in respondent's ability to complete backward digit span tasks accurately. Based on these abnormal findings, he referred respondent to Dr. Robert Elliott. According to Dr. O'Connor's report, Dr. Elliott's findings "confirmed rather precisely the deficits noted in my own clinical evaluation." (A-1 at 175). In his opinion, "[t]he most likely explanation for the abnormal findings is some form of nonspecific aging pathology. *Id.* at 181.

Dr. Robert Elliott is a board-certified neuropsychologist. He devotes fifty percent of his practice to the evaluation of pilots, consulting with most of the major air carriers and with the FAA. He has performed over 800 evaluations of airmen since 1976. (TR-45). Dr. Elliott performed twelve neuropsychological tests on respondent: the Wechsler Adult Intelligence Scale-Revised (WAIS-R); the Trail Making Test (parts A and B); the Booklet Category Test; the Rey Osterrieth Complex Figure Test; the Rey Auditory-Verbal Learning Test; the Wisconsin Card Sorting Test; the Boston Naming Test; the Wechsler Memory Scale-Revised; the Controlled Oral Word Association test; the Manual Finger Tapping Test, and the FAA Computerized Cognitive Screening Battery (COGSCREEN).[6]

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[6] See *infra* for a discussion of the admissibility of COGSCREEN.

Dr. Elliott explained the purpose of these tests in the order in which he administered them to respondent. (TR-79). Respondent performed in the average or above-average range on the WAIS-R, which measures level of functioning from an intelligence standpoint. However, in the second test which was administered, the Trailmaking Test, which assesses a person's ability to sequence, respondent's performance on Part B was significantly impaired using Reitan's population or pilot norms.[7] Dr. Eliott next administered the Booklet Category Test. He explained that this test is a very sensitive measure of cognitive impairment, and respondent's performance was so poor that, in his opinion, there is no question impairment is present. (TR-91). Respondent scored 112 errors on this test. Using Reitan's (general population) norms, 51 is indicative of impairment. Using pilot norms, 30 errors is indicative of impairment. On the Rey Auditory-Verbal Learning Test, a memory test and the fifth test administered by Dr. Elliott, respondent was given 15 words and then asked to repeat them. Respondent repeated two words correctly, and made up two that weren't even mentioned.

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[7] Performance on neuropsychological tests is assessed by measuring an individual's test results to other individual's test results, referred to by the experts as "norms." Using Heaton's norms, test scores are compared to others of the same age and education level. Utilizing Reitan's norms, test scores are compared to the general population. Dr. Elliott also used norms for the pilot population. According to an article authored by Heaton and others, Comprehensive Norms for an Expanded Halstead-Reitan Battery (Administrator's Exhibit A-17), at extreme age levels, age-corrected scores are not particularly useful in evaluating good conceptual skills in an absolute sense, "i.e., while it is normal to have relatively weak conceptual skills at this age, the average 75-year old high school graduate is not likely to perform well in a conceptually demanding job." (Exhibit A-17, p. 36). Respondent's expert neuropsychologist disagrees. In the Board's view, the record here is persuasive that air show performance is a conceptually demanding job and we find unconvincing respondent's experts' testimony that the use of other than age-corrected norms is inappropriate.

In Dr. Elliott's opinion, this result is very unusual and is indicative of neuropathology. (TR-93).

The sixth test administered to respondent was the Wisconsin Card Sorting Test. This test assesses the ability of a person to use logic and reasoning to solve a novel problem, by measuring the ability to change one's response style to be more effective, i.e., if the person continues to use an approach that is inappropriate, to solve a problem, his responses are indicative of cognitive deficit. Respondent's results were found to show significant impairment using Heaton's norms, Reitan's norms, and pilot norms. When compared to others of the same age, respondent fell into the 5th percentile (out of 100 people he would rank between 1 and 4 from the bottom).[8] On the tenth test administered, the Manual Finger Tapping Test, respondent's performance was found to be indicative of significant impairment, even when compared to persons of respondent's age group.

In addition to respondent's poor performance on selected tests, Dr. Elliott testified that from a clinical perspective, respondent needed a lot of instruction, responded very slowly, and at times did not seem to understand directions. Dr. Elliott recommended that respondent see a neurologist to rule out neuropathology or an identifiable neurodegenerative disease process because respondent's test results were strongly suggestive to him of cognitive deficit. (TR-130). Respondent was referred to Michael E. Gold, M.D., a neurologist.

Dr. Gold reported to Dr. O'Connor that respondent's neurological exam was normal. (A-1, p. 202-204). Nonetheless, he ordered an MRI [magnetic resonance imaging]

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[8] Respondent objected to the consideration of these test results because, according to his experts, the edition used by Dr. Elliott was a research edition and inappropriate for evaluation purposes. Nonetheless, this tool was also administered by Drs. Uchiyama and Johnsen.

brain scan, an electroencephalogram [EEG], and a SPECT scan.[9] Dr. Gold reported that both the MRI and EEG were normal.[10] However, the report of the SPECT scan performed on November 4, 1992 by Albert Salcedo, M.D., found that

> "[t]he superior parietal areas demonstrate a mild tracer deficiency in symmetrical fashion. These appear to extend at least part way up over the cerebral convexities. The remainder of the cortex appears normal. There was symmetrical and normal uptake in the basal ganglia and cerebellar hemispheres."

(A-1, p. 207). Dr. Salcedo concluded:

> "This is a borderline examination suggesting the possibility of biparietal areas of hypoperfusion/hypometabolism. These findings should be correlated with neuroanatomical findings and with the patient's condition. If clinical symptoms persist, one may wish to consider a six month follow up examination."

Id.[11]

In June 1993, respondent sought a second opinion, with the consent of the Federal Air Surgeon. Respondent was evaluated by Dr. Uchiyama, a neuropsychologist at the University of California at Los Angeles (UCLA) Institute

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[9] SPECT scans show the distribution of blood flow to the brain. (Testimony of Dr. Ziessman, TR-826). SPECT scans are an accepted diagnostic tool. (Deposition of Dr. Simon, p. 19).

[10] The Administrator's expert neurologist testified that the MRI was normal for a 70 year old person, but that he considered the findings of "slight sulcal widening in the occipitorparietal area" and "a rare punctate area of increased signal" (A-1, p. 205) as not normal, and consistent with the findings of the SPECT scan. (Testimony of Dr. Pincus, TR-413).

[11] The Administrator's expert in nuclear medicine described hypoperfusion as when not enough blood goes to a certain part of the brain. (Testimony of Dr. Ziessman, TR-829).

and Hospital. Dr. Uchiyma administered 18 tests, including most of those previously adminstered by Dr. Elliott. According to Dr. Elliott, who testified concerning the UCLA report, Dr. Uchiyma administered novel tests to compensate for what neuropsychologists term "practice effect," i.e., the belief that an individual will improve in performance due to practice after repeated testing, rather than due to improvement in terms of cognitive functioning. (TR-136).

Dr. Uchiyama's report, which is contained in Administrator's Exhibit A-1 at pages 122-138, indicates that respondent's results were *age-corrected.* (A-1, p. 130.) (Emphasis added). On attention and concentration tests respondent ranged from the Impaired to the High Average range. *Id.* at 131. "[O]n a measure of visual perceptual tracking and divided attention (Trial Marking Test, Part B) . . . [respondent] evidenced significantly slowed performance that placed him in the Impaired range (less than the 1st percentile)," although Dr. Uchiyama noted there were "no errors, prompts, or near misses." *Id.* Respondent also showed "discrete areas of deficit" on the CALCAP. *Id.* Respondent was "functioning more than two standard deviations below the normative sample mean in the areas of sequential reaction time, language discrimination, response reversal-words, and form discrimination. In addition, he exhibited highly variable performance on one of the three simple reaction time measures that were assessed on the dominant hand." *Id.* Respondent's executive functioning and higher order reasoning were also found to range from Impaired to the Average range. *Id.* at 132. On the Wisconsin Card Sort Test respondent scored within normal limits. *Id.* Respondent's performance on various verbal learning and memory tests ranged from Impaired to Superior. On the Rey Auditory Verbal Learning Test his performance was evaluated as significantly higher than his performance six months earlier when administered by Dr. Elliott. *Id.* at 133.

Respondent also underwent a SPECT scan at UCLA on June 1, 1993. Dr. Mena reported finding:

> "bilateral temporal hypoperfusion, right dorsal frontal hypoperfusion, [and] left dorsal parietal hypoperfusion."

Dr. Mena initially concluded that the focal right, frontal, bilateral temporal and left parietal hypoperfusion suggest "multiple strokes or degenerative changes in the areas outlined above." In a subsequent report, however, he revised his conclusion by deleting his reference to stroke or degenerative changes and inserting the words "Normal variance?".

According to Dr. Uchiyama's report, the results of respondent's neuropsychological testing could "reasonably be consistent with his SPECT report of 6/1/93." (A-1, p. 135). However, he noted that respondent's deficits "appear to be above the threshold required for normal flight, as this appears to be a highly overlearned skill in the patient, and he is able to successfully compensate for such weaknesses. However, because of the patient's reduced reaction time and ability to deal with novel stimuli, some question remains as to how quickly he may be able to deal with an emergency situation that was out of his normal range of experience." (TR-136). Dr. Uchiyama concludes his assessment in pertinent part as follows:

> In the present case, Mr. Hoover revealed some selected risk signs on neuropsychological performance that could be viewed as signs of accelerated aging or subclinical (subthreshold) disease. His recent SPECT also revealed some perfusion changes that could be viewed in the same light. Although his other basic cognitive abilities were shown to be well intact, these subclinical changes should not be ignored, nor should they by [sic] over-interpreted at this time. Frankly, if they occurred in an individual in another profes-

> sion, e.g., psychiatry or neuropsychology, they would probably have less significance at this age because of few demands on speeded information processing in clinical practice. However, although tasks measuring speed in information processing decline steadily with age, one might also expect someone of Mr. Hoover's profession to show a slower gradient with age. However, this is not the case.

(A.1, p. 137).

Finally, Dr. Elliott testified concerning an article appearing in the Journal of Aviation, Space, and Environmental Medicine in April 1989, entitled *Neuropsychological Screening of Aviators, A Review,* authored by Banich, Stokes, and Elledge. According to Dr. Elliott, the article enumerates those sognitive skills that are critical for piloting performance—perceptual motor abilities, spatial abilities, working memory, attention, processing flexibility, and planning and sequencing skills. (TR-62).[12] Dr. Elliott believes that respondent continues to be a consummate aviator because his routines are very well practiced. He is concerned, however, that when presented with a novel situation the risk that respondent's impairment would not allow him to compensate for his cognitive deficits is too great. (TR-174-176).

Dr. Richard Gaines is a pilot and a board-certified neuropsychologist. He has examined over 1100 pilots in the last 20 years, including 14 years on active duty performing aviation-related research psychology. Dr. Gaines testified that he agreed with the cognitive skills identified in the *Banich* article as necessary for pilots. (TR-308). Dr. Gaines reviewed the test results obtained by Drs. Elliott and Uchiyama, as well as the evaluation performed by respondent's expert witness, Dr. Johnsen. According

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[12] The law judge refused to accept the article, identified as Exhibit A-5, into evidence. *See infra.*

to his review, even Dr. Johnsen obtained impaired results from respondent on the Booklet Test, using pilot norms. In Dr. Gaines' expert opinion, respondent's excellent flight performance cannot compensate fully for his cognitive deficit, in the event something novel should occur.[13]

Jonathan Pincus, M.D., has been the Chief of Neurology at Georgetown University Hospital since 1986. From 1974 to 1986 he was a full professor at Yale Medical School. His particular interest is in behavioral neurology, movement disorders, Parkinson's Disease and Alzheimer's Disease. Dr. Pincus testified that in order to diagnos neurological deficit, a neurologist's most important source of information is the patient's history. A neurologist will also perform an examination and order a variety of tests—CT scan, MRI scan, EEG, SPECT scan and PET scan. Although the neurologist will also perform a Mini-Mental Status Exam to test cognitive functioning, the best documentation and quantification of cognitive functioning is performed by neuropsychologists, who are specially trained to perform these tests.

According to Dr. Pincus, SPECT scans are very helpful in making neurological diagnoses because there are certain characteristic configurations which appear on the SPECT scan for certain conditions, e.g., Alzheimer's disease, temporal lobe epilepsy, and stroke. Dr. Pincus testified that if a traumatic incident had caused brain dysfunction it would be reflected by abnormality on his SPECT scan. Dr. Pincus is aware that respondent has a history of loss of consciousness which occurred when his aircraft was shot down in World War II, but he finds it hard to believe, in his expert opinion, that respondent sustained serious brain damage at that point in time and then continued to perform as he has for the past 50 years. Dr. Pincus re-

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[13] Respondent agreed, on cross-examination, that he has not "experienced every possible emergency that one could be confronted with in aviation." (TR-608).

viewed respondent's entire airman file.[14] He noted what he believed are significant changes in neurological examinations performed on respondent in the past year. First, he pointed out, the June 1993 SPECT scan shows what he thinks are more abnormalities than the October 1992 SPECT scan. Secondly, Dr. Pincus notes that Dr. Hisey [15] found ankle jerks on examination of respondent in 1993, but Dr. Gold had not. (TR-416). In Dr. Pincus' opinion, ankle jerks almost always mean peripheral neuropathy at one of the peripheral nerves. (TR-417).[16] Dr. Pincus opined that there is an overwhelming likelihood of neurologic dysfunction. (TR-418).[17]

Respondent testified that he did not perform erratically at the June 1992 air show. He offered what appear to be reasonable explanations for his behavior (for example, he had to perform a go-around because of a hydraulic pressure problem). He produced evidence which he believes supports his claim that the two FAA inspectors "conspired" to get him grounded.[18] In addition, respondent pro-

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[14] Dr. Pincus also placed significance on the fact that since 1982, respondent has been involved in 5 incidents and 2 violations, which he believes may be indicative of decreased function. Respondent testified that all of the incidents were as a result of mechanical malfunction or another pilot's act.

[15] Dr. Hisey is a neurosurgeon who examined respondent.

[16] Dr. Pincus also interpreted the 1992 MRI as not normal and consistent with the SPECT scan. (TR-414).

[17] On cross-examination Dr. Pincus acknowledged that the Georgetown Neurology Department has a grant from the FAA to develop COGSCREEN. (TR-427).

[18] Respondent made much of the fact that the two inspectors allegedly prepared their statements together. He also presented testimony that one of them "hates" tall, skinny men. In our view, this purported impeachment testimony lends little support to respondent's case. In any event, the reasonableness of the Administrator's request for evaluations is not before us, nor do we agree with respondent's contention that the medical evaluations are suspect because they were prompeted by these statements.

duced several top air show performers, all of whom testified that they saw nothing in respondent's performance that day, or any other day, to suggest that he has any medical problems which would make him unqualified to fly.[19] Respondent also produced recent video tapes which showed that he is still able to perform[20] his air show routine.[21] The law judge actually observed respondent perform during a recess in the hearing.[22]

As to his performance on the neuropsychological testing administered by Dr. Elliott, respondent claims that he was told by Dr. Elliott the day before the testing that it would take four hours. When he arrived at Dr. Elliott's office he learned that it would take the entire day. Respondent claims he was under a lot of stress, and that Dr. Elliott never offered him any rest breaks or lunch

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[19] We think it significant that all of the air show performers did agree, on cross-examination, that timing and decision-making skills are critical to air show performers, who, in their opinion, must be even "sharper" than other pilots.

[20] We question the relevance of respondent's actual performance skills to the issue of unrestricted medical certification. As the Administrator points out in his appeal brief (p. 110, n. 42), the law judge relies on "Webster's" as his source for his mistaken belief that cognition is defined as "an inability to perform." (TR-540; *see also* TR-631). *Webster's Ninth New Collegiate Dictionary* (Merriam-Webster, Inc. 1984 at 257 (defines cognition as "the act or process of knowing including both awareness and judgment; *also*: a product of this act"). Perhaps the law judge was confused by the use of the word "act" in the definition.

[21] We have grave doubts concerning the propriety of the law judge's permitting a pilot to operate the controls of an aircraft, even under the watchful eye of another pilot who is serving as the pilot in command, when the pilot who is manipulating the controls has had his medical certificate revoked on an emergency basis because the Federal Air Surgeon has deemed him unqualified.

[22] We think that in accordance with the Board's *ex parte* rules, 49 C.F.R. § 821.61, the law judge should not have had any communications with respondent's witnesses on the air field and outside of the presence of the Administrator's representatives.

breaks. The only break he took was when, at noon, he called his wife to cancel their afternoon plans. Respondent also claims that Dr. Elliott gave him no explanations of the testing, and that he was very unfriendly towards respondent. Finally, respondent claims that Dr. Elliott told him that the testing would not affect his medical certification. Dr. Elliott denies telling respondent that the tests would only take four hours, and he denies not giving respondent any breaks during the testing. He did recall respondent calling his wife to change their plans for the afternoon, but he testified that he offered respondent the opportunity to return at a later date and respondent wanted to complete the testing that day. As to the statement that the testing would not affect respondent's medical certification, Dr. Elliott does not deny making this statement, but explained that at the time he was only concerned with determining if respondent had any neuropsychological deficits. Respondent also testified that Dr. O'Connor and Dr. Satz at UCLA both told him that they could find nothing wrong with him, and Drs. Uchiyama and Mena gave him "a clean bill of health."

Brent Hisey, M.D., is a Board-certified neurosurgeon and a Flight Surgeon with the Air Force Reserves. He is also a pilot. Dr. Hisey examines at least 20 pilots a month for the Air Force. He explained that in the Air Force a pilot is either "fit to fly," or he is grounded. In his expert opinion, respondent is "fit to fly." Dr. Hisey performed a neurological examination, a physical examination, and a laboratory examination on respondent, with particular emphasis on the frontal lobes, on October 12, 1993. (A-1, pages 72-78). According to the history obtained from respondent, respondent had "minor bumps" to his head in 1947 and 1954, but no significant closed head injury. (TR-718). Based on his examination, respondent had "an average neurological examination for a 71-year old male." (TR-713).

Dr. David Johnsen has been a clinical psychologist since 1987. He is not Board-certified as a neuropsycholo-

gist, but he is licensed by the State of Oklahoma to perform neuropsychological assessments. Dr. Hisey referred respondent to Dr. Johnsen. Dr. Johnsen's testing was limited to the re-administration of the four neuropsychological tests on which respondent had previously performed poorly. According to his report (A-1, pages 50-55), on the Category Test respondent committed 88 errors. "This test would reflect significant impairment if Mr. Hoover were being compared to 40 year old males, with comparable education. However, when compared to males, ages 70 to 74, his score reflects only mild impairment." (A-1, p. 53). Respondent performed at an average level on the California Verbal Learning Test. Respondent showed "significant improvement" on the Trail Making Test and the Wisconsin Card Sort Test. *Id.* Dr. Johnsen testified that he was not concerned with "practice effect" on these tests because a year had lapsed since their previous administration. The results of Dr. Johnsen's testing were that respondent "performed at an average level compared to individuals of his own age." (TR-652). Although he agreed with Dr. Uchiyama's finding of selected risk signs on neuropsychological performance, in his opinion respondent could not continue to perform for 25 air show performances, without problems, if he truly suffered from a degenerative brain disease. (TR-671). Dr. Johnsen opined that respondent's performance on Dr. Elliott's testing would have been significantly impacted if respondent had been offered no breaks.

Dr. Antoinette Appel is a neuropsychologist, and in fact holds the first degree ever awarded in neuropsychology in the United States. She attacked the validity of the tests administered by Dr. Elliott because of respondent's claim that he was not given breaks during the entire day of testing. She noted that there is a marked drop-off in performance after 90 minutes, and without lunch respondent's blood sugar would have been lower to the point of affecting his performance. Dr. Appel also questioned Dr. Elliott's use of the Wisconsin Card Sort Test, because

it is intended for research purposes only. Finally, according to her review of Dr. Elliott's WAIS raw data, there is an error in Dr. Elliott's computations and respondent's score actually fell within normal limits. Dr. Appel testified that in her expert opinion [23] Dr. Elliott's test results are "unreliable" (TR-893) and are "false alarms." (TR-893). Using Dr. Johnsen's data and Halstead-Reitan (age-corrected) norms, she thinks respondent is unimpaired. (TR-894). Moreover, she testified that she observed respondent for the 72 hours preceding this hearing and observed no aberrant behavior. (TR-896).

Dr. Appel testified that respondent's performance while flying is the best indicator of his cognitive abilities, because there is no validated correlation between neuropsychological tests and flying, citing an article written by Dr. Gary Kay who subsequently developed COGSCREEN for the FAA, in support of her assertion. (TR-897-900).[24] As to the findings on the SPECT scans, Dr. Appel testified that she has used them frequently in the last 4 or 5 years, and in her experience with over 12,000 patients with head injuries, there have been symmetrical abnormalities on the scans. On cross-examination, Dr. Appel admitted that using Heaton's norms and Dr. Uchiyama's raw data, respondent does fall within the impaired range on selected tests. (TR-963).

Theodore Simon, M.D., is a professor of radiology at the University of Texas Southwestern Medical Center, and is board-certified in nuclear medicine. He testified by deposition concerning the findings of the two SPECT scans performed on respondent. Dr. Simon explained that hypoperfusion can be caused by strokes, abscess, tumors,

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[23] Dr. Appel testified as an expert in 12 cases last year, and is involved in about 2 depositions per week.

[24] We think the law judge erred by excluding evidence which would have shown that Dr. Appel relied on quotations taken out of context from an outdated journal article.

schizophrenia, poisoning, chronic fatigue syndrome, drug abuse, seizure, and degenerative brain disease. (Deposition at 38). According to Dr. Simon, if respondent were suffering from degenerative brain diseases, he would expect it to show over a series of studies, although he agreed that six months may be too short a period of time to reveal degeneration. (Deposition at 39). Dr. Simon opined that other processes are less probable *because* respondent has a history of trauma. (Deposition at 43). He noted that while the scans of respondent's brain do involve both sides of the brain, they do not suggest to him a great deal of symmetry. (Deposition at 42). Alzheimer's Disease is much more symmetrical than respondent's studies. (Deposition 43-44). It is not uncommon for trauma to also be fairly symmetric. (Deposition-41). Dr. Simon agreed on cross-examination that findings of bilateral temporal and parietal perfusion are highly predictive of Alzheimer's Disease. (Deposition-48). Finally, Dr. Simon agreed on cross-examination that degenerative disease could not be excluded by the findings of respondent's SPECT scans. (Deposition at 53).

Harvey Ziessman, M.D. testified on behalf of the Administrator in rebuttal. Dr. Ziessman is the Director of Nuclear Medicine at Georgetown University. (TR-822). Dr. Ziessman interprets SPECT scans daily in his practice. In addition, he is currently writing a textbook on nuclear medicine in which he devotes one chaper on brain profusion imaging. De Ziessman testified that the pattern of symmetrical underprofusion of the parietal and temporal lobes is approximately 90% specific for a degenerative disease of the brain. (TR-844). Accordingly, Dr. Ziessman disagreed with Dr. Simon's testimony. In his expert opinion, the findings on the SPECT scans performed on respondent are characteristic of degenerative disease of the brain and not trauma. He also notes that on the second SPECT scan there is a right-dorsal frontal profusion defect which was not noted on the first SPECT scan. (TR-851).

The administrative law judge found in favor of respondent. In support of his decision, he cites Dr. O'Connor's, Dr. Uchiyama's, and Dr. Hisey's "recommendations" that respondent should be given an unrestricted medical certificate. The law judge also made "credibility" findings against Drs. Elliott, Gaines, and Pincus because, he found, they have ongoing monetary interests with the FAA. The law judge does not discuss the testimony of Drs. Simon and Ziessman. His only reference to the SPECT scans is a comment that the repeat SPECT scan performed in June 1993, showed no changes. (TR-1010). This finding is directly controverted by Dr. Ziessman's testimony. In fact, we think all of the law judge's findings are belied by the evidence, and his analysis is clearly deficient.

In order to prevail in this case respondent was required to go forward with evidence which rebutted the results of the neurological, radiological and neuropsychological examinations. In the Board's view, respondent's evidence merely suggests other explanations, and fails to rebut what we consider to be overwhelming evidence of cognitive deficit that makes respondent unqualified to hold an unrestricted airman medical certificate. *Administrator v. Doe,* 3 NTSB 192 (1977).

As both parties recognize in their briefs before the Board, we do not evaluate medical expert testimony for its truth or falsity, because the matter of the expert medical witness' veracity has already been resolved when the the witness is evaluated and accepted as an expert in the field of medicine about which he or she has been called to testify. Once expertise has been established, the Board evaluates the testimony on the basis of logic, depth, and persuasiveness. *Petition of Doe,* 4 NTSB 84, 90 (1983). Notwithstanding this precedent, however, the administrative law judge appears to have accepted respondent's overbroad and unsubstantiated suggestions as to the veracity of the expert opinions offered on behalf of the Ad-

ministrator.[25] He dismisses Dr. Elliott's testimony because he has served as a consultant to the Administrator, even though Dr. Elliott testified on cross-examination that most of his aviation-related work is with the major air carriers. In the Board's view, Dr. Elliott's aviation-related experience renders his evaluation more persuasive than respondent's expert neuropsychologist's evaluation, because he is able to recognize the validity in comparing respondent's test results with pilot norms.[26] Moreover, the law judge appears to have accepted respondent's disputed claim that Dr. Elliott administered the tests under oppressive circumstances as an excuse to exclude consideration of all of his findings, even though significant abnormal findings were obtained during the beginning of his evaluation. Similarly, Dr. Pincus' testimony is disregarded because Georgetown has "some sort of grant" with the FAA, even though there is not a scintilla of evidence which suggests that Dr. Pincus' opinion is based on anything other than his expertise in neurology. The law judge makes no effort to explain away Dr. Ziessman's testimony. He simply ignores it.

The law judge also erred by adopting respondent's counsel's claims that "all three sets of doctors" found that respondent is entitled to a second-class medical certificate. Had the law judge carefully reviewed all of the medical records,[27] he would have noted that both Dr.

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[25] We do not intend to say that the truthfulness of an expert may never be questioned, but we fail to understand how the law judge could disregard all of Dr. Elliott's testimony, even if he believed respondent's claim that Dr. Elliott had been less than forthright in discussing the possible impact of the testing on respondent's career.

[26] We also think that part of this analysis requires a weighing of the expert's credentials and experience in the field of expertise about which he or she is testifying.

[27] We are perplexed by the law judge's apparent belief that the Board does not wish him to review all the medical evidence fully before rendering his decision. To the contrary, we think that is his duty.

O'Connor and Dr. Uchiyama recommended certification *with restrictions.*

Finally, we find that many of the law judge's evidentiary rulings are legally deficient.[28] He precluded the Administrator from presenting evidence concerning COGSCREEN, a computerized neuropsychological evaluation which was developed by the FAA in the late 1980s, based on repondent's counsel's unsupported assertion that this testing has not been validated and is therefore inadmissible "novel scientific evidence." This is an administrative proceeding. The Administrative Procedures Act (APA), 5 U.S.C. § 556(d), controls the admission of evidence, not the Federal Rules of Evidence. Under the APA, any evidence which is relevant should have been admitted. The law judge would have then been free to give that evidence any weight he deemed appropriate. Even under the Federal Rules, there is no requirement to exclude an expert opinion based on a scientific technique simply because the technique is not "generally accepted" as reliable in the relevant scientific community. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2794 (1993), the Supreme Court rejected such a rigid rule, finding it at odds with the general approach of the Federal Rules, which have relaxed traditional barriers to opinion testimony. We can imagine no reason why the law judge would apply an even more stringent standard in these proceedings As the Supreme Court notes in *Daubert,* it is the responsibility of the judge, faced with a proffer of expert scientific testimony, to make an assessment of whether the testimony's underlying methodology is scientifically valid and properly can be applied to the facts at issue. *Id.* at 2796. Moreover, whether a technique has been subjected to peer review or publication

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[28] Were it not for the fact that our review of the evidence convinces us that the revocation order should be affirmed, we would be inclined to remand the case for a new hearing before a different law judge.

does not necessarily correlate with its reliability. *Id.* at 2797. As the Court notes, cross-examination and presentation of contrary evidence rather than wholesale exclusion is the appropriate means by which such evidence may be challenged. *Id.* at 2798. Instead, in this case, the law judge refused to even listen to the proffer, instructing the Administrator's counsel to make it on the record outside of his presence.[29]

Based on the foregoing, we are compelled to set aside the initial decision. We acknowledge respondent's remarkable pilot history and significant contributions to aircraft evolution. Nevertheless, we have reviewed the entire record *de novo*, and we find that the Administrator's expert witnesses' testimony was far more persuasive than respondent's witnesses' testimony. Dr. Elliott's test result are never refuted. Indeed, his findings are confirmed by subsequent testing. Moreover, by Dr. Appel's own admission, when the test results obtained by Dr. Johnsen are compared with norms which are not age-corrected, there is significant impairment in several cognitive skill areas. We are convinced that the public's interest in aviation safety requires that respondent's cognitive testing results be compared with more than the norms for the average 70 year old person. Respondent is not seeking a license to perform everyday activities. Respondent seeks an unrestricted second-class airman medical certificate so that he may continue to perform aerobatic routines in front of numerous spectators. In any event, we are convinced that the neuropsychological testing which suggests cognitive deficit is confirmed by what all of the neurology experts agree are abnormal

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[29] Had the Administrator been permitted to offer evidence of COGSCREEN, he would have offered the testimony of Dr. Kay, who, in accordance with the offer of proof, and as explained in his analysis which is contained in the medical records (Exhibit A-1, pp. 85-86), would have testified that when respondent's test battery is compared to aviators over the age of 60 his performance on several variables is "significantly abnormal."

findings on the radiological scans. We fail to see how the law judge could find the testimony of Dr. Appel, a neuropsychologist, regarding her interpretation of the SPECT scans, more in depth or persuasive than Dr. Ziessman's testimony, as he is an expert in nuclear medicine. Even Dr. Simon, respondent's expert in nuclear medicine, cannot state that degenerative brain disease is excluded by these scans—he only suggests trauma as another explanation. In any event, we think that Dr. Pincus' and Dr. Ziessman's testimony that there is a change in the June 1993 SPECT scan, a right-dorsal frontal profusion defect, not apparent in the October 1992 SPECT scan, refutes the explanation that trauma is the probable explanation for the abnormal SPECT scan findings. We conclude that the Administrator proved by a preponderance of the evidence that respondent has a cognitive deficit which makes him unqualified to hold an unrestricted second-class airman medical certificate.[30]

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted; and

2. The initial decision is reversed and the Administrator's emergency order of revocation is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

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[30] Whether the respondent is entitled to a restricted certificate under section 67.19 is a matter we are not empowered to review.

APPENDIX C

BEFORE THE NATIONAL TRANSPORTATION SAFETY BOARD

Docket No. SE-13417

EMERGENCY

IN THE MATTER OF:

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION,
Complainant,

vs.

ROBERT ANDERSON HOOVER,
Respondent.

ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board, held here in Oklahoma City. Today is Sunday, the 16th; we started the hearing at 9:00 on Thursday morning, and we continued through—it is now 11:30 a.m. here on Sunday. And I would like to thank all of the parties for an excellent presentation and for some long weekend work that we have had to do.

I know that there are at lot of people here, including myself, who have to fly home today; hopefully we will get to fly home today. So I will try to make my comments as brief as possible.

The hearing was conducted on the appeal of Mr. Robert Anderson Hoover, from an order of revocation that revoked Mr.—it is an emergency order of revocation, and it revoked Mr. Hoover's second-class medical certificate. I will refer to Mr. Hoover as the Respondent.

The complaint was filed on behalf of the Administrator of the Federal Aviation Administration through the General Councel's Office in Washington, D.C. The matter has been heard before me, William R. Mullins. I am an administrative law judge for the National Transporta-

tion Safety Board and, as provided by the Board's rules and as is mandated by the Board's rules, I will issue an oral decision here this morning.

The matter came on pursuant to notice that was given to the parties. The Administrator was present at all times and represented through these proceedings by Ms. Susan Caron, Mr. Robert Vente, and Mr. Gregory Winton, Esquires, of the General Counsel's Office in Washington, D.C.

The Respondent was present at all times and was represented by Mr. John Yodice of Washington, D.C., and Mr. F. Lee Bailey, of Palm Beach, Florida.

The parties were afforded a full opportunity to offer evidence; to call, examine, and cross-examine witnesses; and in addition, the parties were afforded an opportunity to make argument in support of their respective positions.

DISCUSSION

In this case, as I indicated, there was an Order of—emergency order of revocation that has revoked the Respondent's second-class medical certificate. And that emergency order alleges that Mr. Hoover has a neurological condition and an organic functional or structural disease, defect, or limitation, and both involved cognitive deficit.

And to those allegations, the Respondent has filed his answer and denied the allegations.

In these proceedings, and unlike our usual medical cases, the Administrator has the burden of establishing, by a preponderance of the evidence, whether or not the order should remain in force and effect after Mr. Hoover filed his appeal.

In our normal medical cases the Administrator has denied a medical, and then the airman becomes the petitioner, and in those cases the airman has the burden of going forward with the evidence.

But as I indicated, in this case although it involves medical issues, it is a little different than those we normally see.

The Administrator called three witnesses in its case in chief. And, of course, the first exhibit that came in was the medical records of Mr. Hoover, which are some 340 pages in length. I may be referring to some of those pages, and I will be referring to different doctors' reports that are contained in there.

I will try to identify the page numbers as I go through, but if I don't, I think everyone is fairly familiar with the different report and where they are found in this 340-page document.

Dr. Elliott was the first witness and the primary witness for the Administrator, and Dr. Elliott is a neuropsychologist. He gave Mr. Hoover—well, let me back up just a minute.

This matter was preciptated by an airshow here in Oklahom City back in the summer of 1992, and after that airshow there were a couple of FAA aviation safety inspectors that filed reports to the Administrator, stating that Mr. Hoover's performance was substandard, that he appeared frail. And those reports are in the evidence. I don't have the page numbers on those reports, but they are part of the medical file.

Those two individuals were listed as witnesses at the outset; however, they were not called by the Administrator. But in any event, as a result of those reports, Dr. Davis requested further medical examination of Mr. Hoover, and that examination was made, and part of that initial examination was made by Dr. Elliott.

And that is how this whole procedure came about. And I won't try to describe it chronologically for the record; that is faily well accomplished in this 340-page document, Administrator's Exhibit 1.

In any event, in this first group of tests and doctors that Mr. Hoover saw was Dr. Elliott, and he administered some tests. One of the tests I excluded because of its research nature.

But of these eleven tests, there were four of them that Mr. Hoover indicated that he had a significant impairment in his cognitive function.

At that time there was no recommendation made by Dr. Elliott in his report, and the report was made back to Dr. O'Connor. And subsequent to that time—and I believe it was back in the summer of 1993—on request of the Administrator—and I think that was through Dr. Pakull of the Air Surgeons Office. In any event, Dr. Elliott gave an opinion that he felt that Mr. Hoover was not qualified to hold a second-class airman's certificate.

Of the four tests that there were problems on, cross-examination revealed that one of the tests was a research test that one of the doctors has testified that it was unethical for Dr. Elliott to give. But in any event, it is not one that is normally given; however, two of the doctors who testified said that the correlation was—between the research version and the normal version was pretty consistent. But there was that issue raised.

There was also an issue raised on cross-examination of Dr. Elliott about the way the test was administered, and there seems to be three problems raised. One was notice to Mr. Hoover about the importance of the tests and the impact it was going to have on his aviation career, and specifically there was no notice that this would, in any event, any way impact his medical certificate. And in fact, the evidence seemed to indicate that he was advised that it wouldn't have any impact.

The second problem with the tests was the time involved. And apparently there was like—the doctor said seven and a half hours involved; Mr. Hoover said there was nine

hours involved. But in any event, there was one brief break at noon, and Mr. Hoover's testimony was that he didn't even know that it was going to take past that time and had been advised that it would take three or four hours.

He had plans that afternoon, and he had to cancel those plans. And some of the other doctors—and there has been indication in the evidence that that could have a significant impact on the credibility of the tests given.

The third element was the time that—there was the time and the notice and then the business about scheduling breaks; that Mr. Hoover said he didn't have any breaks; he went straight through the whole time, took one break at noon to call his wife and go to the restroom.

Dr. Gaines then was called, and Dr. Gaines also is a neuropsychologist. Dr. Gaines had reviewed Dr. Elliott's report, and he reinforced, basically, what Dr. Ellott had testified to, and then Dr. Pincus was called.

Dr. Pincus is head of neurology at Georgetown University, and he testified that he had reviewed these files and felt that, based on the tests that Dr. Elliott had administered, the subsequent tests, as given by the UCLA medical people—which would be Dr. Uchiyama and Dr. Satz's report—and he also, I think, had reviewed Dr. Hisey's report, which was the third group of tests undergone by the Respondent. And he also concluded that Mr. Hoover's medical certificate should be revoked.

Mr. Hoover then testified for the Respondent, and Mr. Hoover is extremely well known in the aviation world. One comment was that—Chuck Yeager made the comment that Mr. Hoover was the best pilot he had even seen.

There was a request—it was objected to by the Administrator, but I granted it, and a viewing—I had a viewing of Mr. Hoover's airshow routine. It was Thursday

afternoon out at the El Reno Airport, some 40 miles west of downtown Oklahoma City.

And the only thing I can say about Mr. Hoover's flying skills, that it occurred to me that my flying skills compared to his are about like my golf skills compared to Jack Nicklaus; there is just no comparison.

Mr. Hoover must be—and certainly the people who testified here—Mr. Tucker and Mr. Loudenslager and Mr. Oliver—who are world-renowned in their own types of performances, who also do these areobatic shows, look up to Mr. Hoover.

Obviously this case has had a lot of notoriety and probably will continue so, because obviously—it was obvious to me at the outset of the hearing that this matter is going to be presented to the full Board, regardless of what my decision was.

But Mr. Hoover testified that when he first went to Dr. Elliott—I think I have covered some of that—he was told initially that he would only be there three to four hours, that about noon he was told that they had three or four hours to go. He hadn't had a break. At that time he took a short break to go to the restroom, call his wife, and then they continued till 5:00 o'clock that afternoon.

Some other interesting comments: Dr.—Mr. Hoover identified a Dr. Puskas—and if I mispronounce those names, please share my apologies to those doctors—but this doctor had been his AME for many years, 20 years, 25 years, and that Dr. Puskas was involved, and there was a conference call—and I don't know whether this occurred during the conference call, but—with Dr. Puskas—apparently Dr. Jordan or some of the FAA doctors and some of the other doctors, but in any event, Dr. Puskas relayed to Mr. Hoover that Dr. Davis, who runs the Air Aviation Medical Center for the FAA here in Oklahoma City, had advised Mr. Hoover through Dr. Puskas that he should

fight this thing, this revocation, because it really wasn't justified.

That is a hearsay statement; however, the statement is consistent with some of the doctors' reports that have come in, and, further, Dr. Davis, I assume, is right here in Oklahoma City, could easily have been called if that particular comment wasn't true.

Mr. Loudenslager and Mr. Tucker and Mr. Oliver, who are all aerobatic pilots of some world renown, were called, and all spoke highly of Mr. Hoover's flying skills. And I though, just as an aside, that these gentlemen may be some of the only people I know, with the possible exception of Mr. Kelleher, down in Southwest—who runs Southwest Airlines, they operate aircraft for a living, for profit. I always—you know, my experience has been you don't make money flying airplanes.

But anyway, these are all highly qualified aerobatic pilots, and they perform around the country with Mr. Hoover. They—I don't think that each of them observed the some 33 performances that Mr. Hoover did after the performance complained of in Oklahoma City, but the three of them had seen many of those 33 performances; none of them had—saw any degradation in his ability to fly.

They talked about the ACE program, which is the Aerobatic Competency Evaluator program that has been set up among the show pilots, if you will; I guess that is how you refer to that group.

And this is a program that has been endorsed by the Federal Aviation Administration, because very few, if any, of the aviation safety inspectors have the flying skills of an aerobatic show pilot. And the whole concept behind the ACE program—and all three of these pilots are in the ACE program—is to self-evaluate and sort of self-police the aerobatic pilots in these shows.

And as ACEs and with that responsibility to keep an eye on all of their brothers and sisters who are in that flying business, they had not observed Mr. Hoover in any respect to deviate from his routine in any way that would indicate any medical problems.

Mr. Norbitt Nester was called, who is an FAA aviation safety inspector. And even though the Administrator did not call the two aviation safety inspectors who originally complained in this case, he certainly rebutted that their observations were made independently, because he had overheard these two gentlemen talking about how to write their letters and how to present it so it wouldn't seem like they had colluded or conspired, if you will, against Mr. Hoover.

Mr. Hoover called three doctors: Dr. Johnsen, who is a neuropsychologist here in Oklahoma City, and he had, subsequent to—and let me digress a minute. There were really three batteries of tests that were given: one by Dr. O'Connor, and that was the group of tests where Dr. Elliott was involved.

Then there was the group of tests given by the UCLA Medical Center, and that was Dr. Uchiyama and Dr. Satz, and then there was a group of tests or examinations given here in Oklahoma City, and that was Dr. Hisey and Dr. Johnsen.

But in any event, Dr. Johnsen was involved in the tests here; it was his opinion that there was no reason that Mr. Hoover could not hold a second-class medical certificate.

Dr. Hisey is a neurosurgeon here in Oklahoma City, and also an Air Force flight surgeon. He also testified that Mr. Hoover was good for this second-class medical.

And Dr. Appel, from Fort Lauderdale, also testified, and she reinforced what Dr. Hisey and Dr. Johnsen have said; had made her own examination of the records, and

also gave some testimony discrediting some of these other exams, not only the way they were given, but also the kinds of exams given, and specifically the one—the Wisconsin Card Sort, that Dr. Elliott used.

And Dr. Appel testified that the—it took some ten times longer to take this research version of this card sort test than the one that should have been given, and she said that—just that in itself would have made a substantial difference in the outcome of the test.

There were a number of exhibits that were admitted. I am not going to even go through all of these exhibits or even identify them in my comments; they are all supportive, in one way or the other, of the Administrator's Exhibit 1, which is the medical records of Mr. Hoover.

For reasons that I am going to give you now, I will tell you up front that I am going to rule on this case in favor of Mr. Hoover. And let me give you the reasons.

There were three groups of medical opinions that were given. As I indicated earlier, there was Dr. O'Connor's opinion that was given by—that was given on the request of Dr. Davis here in Oklahoma City; Dr. Uchiyama and the people at UCLA—Dr. Uchiyama and Dr. Satz, and that opinion was apparently given after Dr. O'Connor's opinion had come in, and subsequently, Mr. Hoover was advised that he was not going to be—that his second-class medical was going to be revoked.

And he asked at that time if he could go to someone else. And apparently—I am not sure, and I am not sure that it is in the evidence how he went to UCLA, but Mr. Hoover lives in the Los Angeles area, and that would be a logical place to go. And then the third group was Dr. Hisey's.

Each of those three groups of—and the base opinions and Dr. O'Connor's opinion—that is page 181 of the Exhibit A-1, and Dr. Uchiyama and Dr. Satz's opinion

is page 137, and Dr. Hisey's opinion is found at page 78—all three groups of those—all of those opinions and the doctors involved recommended that Mr. Hoover continue to fly, that he was qualified to have a medical certificate.

Dr. Uchiyama's report said that—he put a proviso on that, but he said he did it for Mr. Hoover's benefit, not for the Administrator, because he said he felt Mr. Hoover would be comfortable, and he even made the comment—and I will—if I can find it, I will read it into the record.

He talked about monitoring for a three- to six-month period. He says such—any for change—monitoring for potential change. And he says, "Such change is unlikely," but "we are confident that Mr. Hoover would appreciate the importance and significance of this recommendation."

So, you know, if you read between those lines, he says he is good to go, but Mr. Hoover should—would probably feel more comfortable having those—that followup.

Likewise, Dr. O'Connor says that Mr. Hoover is qualified for second-class medical, but he did recommend reviewing a—the blood count, that apparently there was a problem with the blood count. Again, that didn't relate to Dr. Elliott's report.

He said we needed to review the blood count and also the SPECT scan. The SPECT scan nor the blood count related to Dr. Elliott's report.

So even though Dr. O'Connor seemed to put a proviso on his recommendation, which he just flat-out says he is fit to hold a second-class medical, neither of those provisos related at all to Dr. Elliott's findings.

And I also note that the medical record reflects that the two followups that Dr. O'Connor recommended—the SPECT scan and the blood count—the blood count was all right when Dr. Hisey did the report, and also the

SPECT scan that was done six months later did not show any change. And he said that that should be done to find change.

Another comment that I have to make about this—and I felt this was important—is that—and particularly Dr. Uchiyama, but that the doctors who made these reports all felt that, notwithstanding these tests, it was extremely important that Mr. Hoover be given consideration by his —for his continued ability to not only operate an aircraft but to operate an aircraft in realms that even the best pilots couldn't even do so.

And also they talked about that it was extremely important not only to consider that continued ability but his training and past training and all of these skills that he has acquired as a test pilot over these many years.

All three of the Administrator's key witnesses just absolutely refuted that; they refused to accept the fact that Mr. Hoover's ability to perform had anything to do with a, quote, medical basis for this finding of cognitive function.

And I cannot agree with that, and I think that taking that position in and of itself almost is discrediting to those doctors.

Third important consideration that I have in this case —and I—the Board has certainly advised me that I am not in a position to review all this medical evidence, and I agree 100 percent. But I can review credibility.

Dr. Elliott and Dr. Gaines, outside the evaluation they did in this case, depend on the Administrator for their livelihood. Dr. Gaines has a year-to-year contract that he talked about, and Dr. Elliott talked about—I think he said at least a third of his business came from the administrator.

The third doctor, Dr. Pincus, although he personally doesn't have that tie, he is the head of neurology at

Georgetown, and he indicated in his testimony that Georgetown has some sort of grant or major contract with the FAA.

Now, all doctors have monetary interest in what they are doing, but Dr. O'Connor doesn't have a monetary interest to Mr. Hoover after this report was submitted. Dr. Uchiyama and Dr. Satz and the folks at UCLA do not have a monetary interest in anything with Mr. Hoover beyond the report that they presented. And, likewise, there was nothing in the evidence that would indicate that Dr. Hisey or Dr. Johnsen have any monetary interest in Mr. Hoover after they gave that initial report.

Dr.—further, Dr. Pincus testified—and I apologize for skipping around; I am trying to summarize these notes. But Dr. Pincus testified that the most important thing in this sort of medical diagnosis was the history. And yet he refused to consider the history that Mr. Hoover has not a single episode of any demonstrated cognitive deficit in any of this day-to-day airshow activities.

Dr. Appel testified that she had been with him for the last 72 hours, watching him; she had not seen any of that.

But he said that that history—but he said history was real important; at the same time, he wouldn't take into account the history, and he said his history of violations—and then it was shown with the Administrator's document and by Mr. Hoover's testimony that this violation history involved one incident that would reflect on his performance.

But several of the others reflected on mechanical malfunction in a couple of cases; nosewheel light; another one was an engine fire; another was a situation where he was doing something he had been doing for several years, and the FAA decided that he should't be doing it, and that was those demonstration flights that he testified about.

So Dr. Pincus on the one hand said history was very important, and then he considered history that didn't relate to this function, and at the same time he refused to acknowledge, even that Mr. Hoover—the fact that there was never any known instances or reported instances or reported instances or viewed incidents of any dysfunction on his part. He just refused to consider that.

All three sets of doctors, even considering Dr. Elliott's report in the best light, said that he is entitled to a second-class medical certificate. And even in the ones where they added a proviso—Dr. O'Connor's report didn't even relate to Dr. Elliott's report, and again, as I pointed out, it talked about the blood count and the SPECT scan, and those things have been followed up on, and there is no problem, hasn't been any change.

But that is considering, as I said, Dr. Elliott's report in the best light. I think Dr. Elliott's report has been, for the purposes of this hearing, discredited, not only by the use of the research test, the one of four that he found the deficit in, which was four out of eleven, but also has been discredited by the way it was given and the notice that Mr. Hoover had at the time it was given.

For all of these reasons, it will be my order that the Administrator's emergency order of revocation will be overruled.

ORDER

It is therefore ordered that safety in air commerce and safety in air transportation does not require an affirmation of the Administrator's emergency order of revocation as issued, and specifically I find that there has not been shown by a preponderance of the evidence in this case that Mr. Hoover suffers the cognitive deficit as alleged in the order, and the order is therefore overruled.

WILLIAM R. MULLINS
Administrative Law Judge

APPENDIX D

[DoT Logo]

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
800 Independence Ave., S.W.
Washington, D.C. 20591

DEC 14 1993

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

Robert Anderson Hoover
880 Via Del Monte
Palos Verdes Estates, California 90274

Re: Docket No.: 94AGC10007

EMERGENCY ORDER OF REVOCATION

The Administrator of the Federal Aviation Administration (FAA) has determined that:

1. On February 12, 1992, you applied for a second-class airman medical certificate and were examined by A. Puskas, M.D., an FAA designated Aviation Medical Examiner, who withheld issuance of the certificate pending further evaluation.

2. On March 2, 1992, Audie W. Davis, M.D., Manager, of the FAA Aeromedical Certification Division, issued you a second-class airman medical certificate.

3. You have a cognitive deficit as demonstrated on neuropsychological testing.

4. The Federal Air Surgeon finds that you are unable to safely perform the duties or exercise the privileges of your airman certificate; or that you may reasonably be expected to be unable to do so within two years because you have:

a. A neurologic condition (cognitive deficit); and

b. An organic, functional, or structural disease, defect, or limitation (cognitive deficit).

5. Based on the foregoing, you do not meet the medical standards of paragraphs (d)(2)(ii) and (f)(2) of sections 67.15 and 67.17 of the Federal Aviation Regulations, 14 C.F.R. §§ 67.15- and 67.17(d)(2)(ii) and (f)(2).

The Administrator has determined that, by reason of the foregoing circumstances, safety in air commerce or air transportation and the public interest require the revocation of all airman medical certificates held by you. Further, the Administrator finds that an emergency exists and that safety in air commerce or air transportation and the public interest require the immediate effectiveness of this order.

NOW, THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator by sections 609 and 1005(a) of the Federal Aviation Act, as amended, that:

1. Effective immediately, all airman medical certificates held by you, including the medical certificate issued to you on or about March 2, 1992, are hereby revoked on an emergency basis;

2. All airman medical certificates held by you shall be surrendered immediately by mail or delivery to:

Assistant Chief Counsel
Attn: Susan S. Caron, AGC-310
Enforcement Division
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

Hays V. Hettinger
Assistant Chief Counsel
Enforcement Division
Office of the Chief Counsel

By: /s/ Susan S. Caron
SUSAN S. CARON
Attorney, AGC-310
Appellate Branch
Office of the Chief Counsel

APPENDIX E

14 C.F.R. 67.11

§ 67.11 Issue.

Except as provided in § 67.12, an applicant who meets the medical standards prescribed in this part, based on medical examination and evaluation of his history and condition, is entitled to an appropriate medical certificate.

14 C.F.R. 67.15

§ 67.15 Second-class medical certificate.

(a) To be eligible for a second-class medical certificate, an applicant must meet the requirements of paragraphs (b) through (f) of this section.

(b) Eye:

(1) Distant visual acuity of 20/20 or better in each eye separately, without correction; or of at least 20/100 in each eye separately corrected to 20/20 or better with corrective lenses (glasses or contact lenses), in which case the applicant may be qualified only on the condition that he wears those corrective lenses while exercising the privileges of his airman certificate.

(2) Enough accommodation to pass a test prescribed by the Adminstrator based primarily on ability to read official aeronautical maps.

(3) Normal fields of vision.

(4) No pathology of the eye.

(5) Ability to distinguish aviation signal red, aviation signal green, and white.

(6) Bifoveal fixation and vergencephoria relationship sufficient to prevent a break in fusion under conditions that may reasonably occur in performing airman duties. Tests for the factors

named in paragraph (b)(6) of this section are not required except for applicants found to have more than one prism diopter of hyperphoria, six prism diopters of esophoria, or six prism diopters of exophoria. If these values are exceeded, the Federal Air Surgeon may require the applicant to be examined by a qualified eye specialist to determine if there is bifoveal fixation and adequate vergencephoria relationship. However, if the applicant is otherwise qualified, he is entitled to a medical certificate pending the results of the examination.

(c) Ear, nose, throat, and equilibrium:

(1) Ability to hear the widespread voice at 8 feet with each ear separately.

(2) No acute or chronic disease of the middle or internal ear.

(3) No disease of the mastoid.

(4) No unhealed (unclosed) perforation of the eardrum.

(5) No disease or malformation of the nose or throat that might interfere with or be aggravated by, flying.

(6) No disturbance in equilibrium.

(d) Mental and neurologic—

(1) Mental.

(i) No established medical history or clinical diagnosis of any of the following:

(a) A personality disorder that is severe enough to have repeatedly manifested itself by overt acts.

(b) A psychosis.

(c) Alcoholism, unless there is established clinical evidence, satisfactory to the Federal Air Surgeon, of recovery, including sustained total abstinence from alcohol for not less than the preceding 2 years. As used in this section, alcoholism means a condition in which a person's intake of alcohol is great enough to damage physical health or social functioning, or when alcohol has become a prerequisite to normal functioning.

(d) Drug dependence. As used in this section, drug dependence means a condition in which a person is addicted to or dependent on drugs other than alcohol, tobacco, or ordinary caffeine-containing beverages, as evidenced by habitual use or a clear sense of need for the drug.

(ii) No other personality disorder, neurosis, or mental condition that the Federal Air Surgeon finds—

(a) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(b) May reasonably be expected, within two years after the finding, to make him unable ot perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

(2) Neurologic.

(i) No established medical history or clinical diagnosis of either of the following:

(a) Epilepsy.

(b) A disturbance of consciousness without satisfactory medical explanation of the cause.

(ii) No other convulsive disorder, disturbance of consciousness, or neurologic condition that the Federal Air Surgeon finds—

(a) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(b) May reasonably be expected, within two years after the finding, to make him unable to perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

(e) Cardiovascular.

(1) No established medical history or clinical diagnosis of—

(i) Myocardial infarction;

(ii) Angina pectoris; or

(iii) Coronary heart disease that has required treatment or, if untreated, that has been symptomatic or clinically significant.

(f) General medical condition:

(1) No established medical history or clinical diagnosis of diabetes mellitus that requires insulin or any other hypoglycemic drug for control.

(2) No other organic, functional, or structural disease, defect, or limitation that the Federal Air Surgeon finds—

(i) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(ii) May reasonably be expected, within two years after the finding to make him unable to perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

(g) An applicant who does not meet the provisions of paragraphs (b) through (f) of this section may apply for the discretionary issuance of a certificate under § 67.19.

14 C.F.R. 67.17

§ 67.17 Third-class medical certificate.

(a) To be eligible for a third-class medical certificate, an applicant must meet the requirements of paragraphs (b) through (f) of this section.

(b) Eye:

(1) Distant visual acuity of 20/50 or better in each eye separately, without correction; or if the vision in either or both eyes is poorer than 20/50 and is corrected to 20/30 or better in

each eye with corrective lenses (glasses or contact lenses), the applicant may be qualified on the condition that he wears those corrective lenses while exercising the priviledges of his airman certificate.

(2) No serious pathology of the eye.

(3) Ability to distinguish aviation signal red, aviation signal green, and white.

(c) Ears, nose, throat, and equilibrium:

(1) Ability to hear the whispered voice at 3 feet.

(2) No acute or chronic disease of the internal ear.

(3) No disease or malformation of the nose or throat that might interfere with, or be aggravated by, flying.

(4) No disturbance in equilibrium.

(d) Mental and neurologic—

(1) Mental.

(i) No established medical history or clinical diagnosis of any of the following:

(a) A personality disorder that is severe enough to have repeatedly manifested itself by overt acts.

(b) A psychosis.

(c) Alcoholism, unless there is established clinical evidence, satisfactory to the Federal Air Surgeon, of recovery, including sustained total abstinence from alcohol for not less than the preceding 2 years. As used in this section, alcoholism means a condition

in which a person's intake of alcohol is great enough to damage physical health or personal or social functioning, or when alcohol has become a prerequisite to normal functioning.

(d) Drug dependence. As used in this section, drug dependence means a condition in which a person is addicted to or dependent on drugs other than alcohol, tobacco, or ordinary caffeine-containing beverages, as evidenced by habitual use of a clear sense of need for the drug.

(ii) No other personality disorders, neurosis, or mental condition that the Federal Air Surgeon finds—

(a) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(b) May reasonably be expected, within 2 years after the finding, to make him unable to perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

(2) Neurologic:

(i) No established medical history or clinical diagnosis of either of the following:

(a) Epilepsy.

(b) A disturbance of consciousness without satisfactory medical explanation

of the cause.

(ii) No other convulsive disorder, disturbance of consciousness, or neurologic condition that the Federal Air Surgeon finds—

(a) Makes the applicant unable ot safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(b) May reasonably be expected, within 2 years after the finding, to make him unable to perform those duties or exercise those privileges; and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

(e) Cardiovascular.

(1) No established medical history or clinical diagnosis of—

(i) Myocardial infarction;

(ii) Angina pectoris; or

(iii) Coronary heart disease that has required treatment or, if untreated, that has been symptomatic or clinically significant.

(f) General medical condition:

(1) No established medical history or clinical diagnosis of diabetes mellitus that requires insulin or any other hypoglycemic drug for control;

(2) No other organic, functional or structural disease, defect, or limitation that the Federal Air Surgeon finds—

(i) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(ii) May reasonably be expected, within two years after the finding, to make him unable to perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

(g) An applicant who does not meet the provisions of paragraphs (b) through (f) of this section may apply for the discretionary issuance of a certificate under § 67.19.

14 C.F.R. 67.19

§ 67.19 Special issue of medical certificates.

(a) At the discretion of the Federal Air Surgeon, a medical certificate may be issued to an applicant who does not meet the applicable provisions of §§ 67.13, 67.15, or § 67.17 if the applicant shows to the satisfaction of the Federal Air Surgeon that the duties authorized by the class of medical certificate applied for can be performed without endangering air commerce during the period in which the certificate would be in force. The Federal Air Surgeon may authorize a special medical flight test, practical test, or medical evaluation for this purpose.
(b) The Federal Air Surgeon may consider the applicant's operational experience and any medical facts that may affect the ability of the applicant to perform airman duties including:

(1) The combined effect on the applicant of failure to meet more than one requirement of this part; and

(2) The prognosis derived from professional consideration of all available information regarding the airman.

(c) In determining whether the special issuance of a third-class medical certificate should be made to an applicant, the Federal Air Surgeon considers the freedom of an airman, exercising the privileges of a private pilot certificate, to accept reasonable risks to his or her person and property that are not acceptable in the exercise of commercial or airline transport privileges, and, at the same time, considers the need to protect the public safety of persons and property in other aircraft and on the ground.

(d) In issuing a medical certificate under this section, the Federal Air Surgeon may do any or all of the following:

(1) Limit the duration of the certificate.

(2) Condition the continued effect of the certificate on the results of subsequent medical tests, examinations, or evaluations.

(3) Impose any operational limitation on the certificate needed for safety.

(4) Condition the continued effect of a second- or third-class medical certificate on compliance with a statement of functional limitations issued to the applicant in coordination with the Director, Flight Standards Service or the Director's designee.

(e) An applicant who has been issued a medical certificate under this section based on a special medical flight or practical test need not take the test again during later physical examinations unless the Federal Air Surgeon determines that the physical deficiency has become enough more pronounced to require another special medical flight or practical test.

(f) The authority of the Federal Air Surgeon under this section is also exercised by the Manager, Aeromedical Certification Branch, Civil Aeromedical Institute, and each Regional Flight Surgeon.